

Lotta Coal Inc. and District 29, United Mine Workers of America, AFL-CIO. Case 11-CA-13677

January 29, 1991

DECISION AND ORDER

BY MEMBERS CRACRAFT, DEVANEY, AND OVIATT

On September 20, 1990, Administrative Law Judge Claude R. Wolfe issued the attached decision. The General Counsel filed exceptions and a supporting brief. The Respondent filed a brief in response to the General Counsel's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Lotta Coal Inc., Horsepen, Virginia, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

¹ The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd, 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Paris Favors, Jr., Esq., for the General Counsel.
Thomas L. Woolwine, Esq., President, Personnel Management Consultants, for Lotta Coal Inc.
Roger L. Yates, District Representative, District 29, United Mine Workers of America, AFL-CIO.

DECISION

STATEMENT OF THE CASE

CLAUDE R. WOLFE, Administrative Law Judge. This proceeding was litigated before me at Bluefield, Virginia, on August 1, 1990, pursuant to charges filed by District 29, United Mine Workers of America, AFL-CIO (the Union) on January 16 and February 16, 1990,¹ and a complaint issued on March 1, 1990, alleging Lotta Coal Inc. (Respondent) violated Section 8(a)(1) of the Act by threatening employees with layoff because they engaged in union activities, and violated Section 8(a)(3) of the Act (the Act) by laying off Charles O. Brooks, George T. McKinney, Paul Miller, and Reggie Shutt because they engaged in such activities. Respondent denies the commission of unfair labor practices.

On the entire record, and after assessing the comparative testimonial demeanor of the witnesses and considering the posttrial briefs of the parties, I make the following

¹ All dates are 1990 unless specifically stated otherwise.

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges, Respondent admits, and I find Respondent is now, and has been at all times material a Virginia corporation with a facility located at Horsepen, Virginia, where it is engaged in the mining of coal. During the past 12 months, which period is representative of all times material Respondent received at its facility, in Horsepen, Virginia, goods and materials valued in excess of \$50,000 directly from points outside the Commonwealth of Virginia. Respondent is now, and has been at all times material an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. LABOR ORGANIZATION

It is well settled that the Union is a labor organization within the meaning of Section 2(5) of the Act. See, e.g., *Spring Ridge Coal*, 299 NLRB No. 29 (July 26, 1990).

III. SUPERVISORS AND AGENTS

The complaint alleges, Respondent admits, and I find that at all times material the following named persons occupied the positions set opposite their names, and have been, and are now, agents of Respondent, acting on its behalf, and are supervisors within the meaning of Section 2(11) of the Act:

John E. Caffrey	President
Rodney Howery	Superintendent
James C. Woolridge	Supervisor

And that James C. Woolridge, at all times material has been, and is now, an agent of Respondent, acting on its behalf, and is an agent within the meaning of Section 2(2) and 2(13) of the Act.

IV. THE ALLEGED UNFAIR LABOR PRACTICES

On January 3, Roger L. Yates, a union district executive board member, appeared at the entry access road to the mine being operated by Respondent, at about 3:30 or 4 p.m., and there distributed union authorization cards and other union literature to employees entering the property on their way to work. Among the employees who then received the cards and literature from Yates were Charles O. Brooks, George T. McKinney, and Paul D. Miller. Supervisor Woolridge was riding in Miller's car when Yates handed the Union materials to Miller who laid them on the seat.

Brooks, McKinney, Miller, and Reggie Shutt were the second-shift work force from 4:30 p.m. to 3 a.m., and all were directly supervised by Woolridge. These five persons, including Woolridge, were eating dinner together on the evening of January 8 when Woolridge volunteered that he had been advised by telephone that the second shift would be laid off if enough of them signed union authorization cards.² Brooks, McKinney, and Miller had signed union authorization cards by then. Even though Woolridge did not name his caller, his statement clearly conveyed a threat of layoff in retaliation for employee union activity and reasonably tended to interfere

² Woolridge's denials that he made such a statement are not credited against the mutually corroborative and credible testimony of Brooks, McKinney, and Miller that he did so state.

with, restrain, and coerce employees in the exercise of rights guaranteed them by Section 7 of the Act. This threat by Woolridge is imputable to Respondent, and violated Section 8(a)(1) of the Act. See, e.g., *Petersburg Mfg. Co.*, 233 NLRB 1236 (1977).

The night shift, consisting of the four nonsupervisory employees named above, was laid off on January 10. The union activity, Woolridge's knowledge of it, Woolridge's threat, and the layoff hard on the heels of the threat are sufficient to set forth a prima facie case the layoffs were designed by Respondent to discourage union membership and activity by its employees. General Counsel has therefore carried his initial burden of showing prima facie the layoffs violated Section 8(a)(3) of the Act.

It is now Respondent's burden to show that the layoff would have taken place in the absence of any union activity. *Wright Line*, 251 NLRB 1083 (1980); *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). To that end John E. Caffrey, Respondent's president, testified that he made the decision to lay off the second shift. He explains that he put on a second shift in March of 1989 because the underground mine here involved was adding more tunnels and the maintenance of equipment became more extensive. The second shift's duties generally were to maintain the machinery inside the mine in good order and otherwise prepare the mine so the first shift could immediately commence producing coal when they came in to work. Caffrey testifies he believed this would help bring down production costs. Thereafter Respondent mined in a northerly direction until a fault was reached in September which caused the mining to turn east. It so proceeded for a bit and then again turned north to where production with the equipment at hand was not feasible because the coal production relative to the amount of rock that would have to be mined to get the coal was very little. Accordingly, Respondent commenced retreating and mining as it withdrew. This was in November 1989 and a second shift was no longer needed because as the mining retreated there was less and less mine to maintain. Caffrey asserts he started considering a reduction in employees in November 1989 because the labor costs went awry, and reached a decision in December, before Christmas, to cutoff the second shift, but delayed the layoff until after the holidays because he is not heartless. He explains the shift was not terminated the first Friday in January 1990 because he had intervening personal family problems which engaged him. On Tuesday, January 9, he directed Rodney Howery to terminate the second shift as they came out from the mine on January 10 at the end of the shift. At the time Howery was the mine superintendent. He left Respondent's employment in March 1990 and did not testify before me.

Caffrey's testimony draws support from evidence of record that the labor costs per ton of coal was \$3.10 in March 1989, dropped to \$2 in April, rose to \$2.40 in May and \$4 in June, dropped back to \$3.40 and \$3 in July and August, respectively, but then rose precipitously to \$5.20 in September, when the fault caused a course change from north to east. The cost dropped to \$2.40 in October, but then in November when the retreat mining commenced the cost rose sharply to \$4.40. It then went to \$4.70 in December. January 1990 saw an abrupt drop to \$2.80, probably due in part at least to the January 10 layoff. For reasons not clear in the record, costs rose to \$4.13 in February, but thereafter were consistently

much lower: March \$2.85, April \$2.84, May \$1.97, and June \$2.96. General Counsel points to the failure to layoff in September 1989 when labor costs reached their zenith as evidence that economic justification is not a defense. I do not agree. Respondent ran into a fault in that month, which I conclude was probably the cause of the high labor cost, noting that the change of direction to a more fruitful vein produced a cost in October less than half that in September. Moreover, there was work for the second shift in September because Respondent had not yet embarked on retreat mining through tunnels already constructed and requiring less maintenance. General Counsel further points out that production was higher in December 1989 than November 1989. This is true, but labor costs per ton were also higher in December. The bottom line is that Respondent's efforts were directed at lower labor costs. General Counsel fails to recognize this when he points to continued overtime for employees after the layoff. There is no requirement that a company discontinue overtime to retain employees, especially where, as here, the function for which the laid off employees were hired is no longer necessary to the operation of the business and the layoffs resulted in lower costs. I also note Respondent hired no employees after the layoff except Brooks and Miller, who returned to work on April 9 and July 16, respectively, after Jerry Davidson, roof bolter, left Respondent's employment on February 14, Leland Vaughn, outside/substitute for others inside, left on April 6, and Charles Williams, outside person, left on July 12, and Scott Tinsley who was a laid-off belt patrolman recalled to the same position, a position all four alleged discriminatees rejected when offered to each of them in turn.

Caffrey was a credible witness, and I conclude a preponderance of the evidence shows the second shift would have been terminated in the absence of any union activity, General Counsel has not shown by a preponderance of the evidence that the layoffs of Brooks, McKinney, Miller, and Shutt on January 10 violated the Act.

CONCLUSIONS OF LAW

1. Lotta Coal Inc. (Respondent) is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. District 29, United Mine Workers of America, AFL-CIO (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act by threatening its employees with layoff because they engaged in protected union activity.

4. The unfair labor practice set forth above affects commerce within the meaning of Section 2(6) and (7) of the Act.

5. Respondent did not violate the Act by laying off Charles Brooks, George McKinney, Paul Miller, and Reggie Shutt on January 10, 1990.

On these findings of fact and conclusions and on the entire record, I issue the following recommended³

³ If no exceptions are filed as provided in Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, Lotta Coal Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening its employees with layoff if they engage in union activity.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the purposes of the Act.

(a) Post at the Respondent's place of business in Horsepen, Virginia, copies of the attached notice marked "Appendix."⁴ Copies of the notice, on forms provided by the Regional Director for Region 11, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt, and be maintained for 60 consecutive days in conspicuous places, including all places where notices to customers are customarily posted. Reasonable steps shall be taken by the Respondent to ensure

⁴If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges violations not specifically found herein.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT threaten you with layoff if you engage in union activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of rights guaranteed you by Section 7 of the National Labor Relations Act.

LOTTA COAL INC.